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Supreme Court, U.S.
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No. 08-(1)

08-465 SEP 30 2008

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IN THE

Supreme Court of the United States

ATE KAYS COMPANY,
Petitioner,

v.

THE COMMONWEALTH OF PENNSYLVANIA,
ACTING BY AND THROUGH THE
DEPARTMENT OF GENERAL SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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September 30, 2008

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QUESTIONS PRESENTED

1. Does a condemnation violate a property owner's right to due process if a governmental body makes the decision to condemn without conducting any investigation or considering any relevant issues necessary to reach a reasoned decision to condemn?

2. Does a condemnation violate a property owner's right to due process when the only investigation and consideration of issues relevant to the decision to condemn were performed by governmental bodies other than the governmental body that made the decision to condemn, and when the governmental body that made the decision to condemn never received or reviewed the results of any such investigation and consideration?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

Petitioner is not a publicly held company and none of Petitioner's stock is owned by a publicly traded company.

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DECISIONS BELOW

The decision of the Supreme Court of Pennsylvania, dated July 2, 2008, ___ A.2d ___, 2008 WL 2607948 (Pa. July 02, 2008), is included in the appendix at Appendix A. The reported decision of the Commonwealth Court of Pennsylvania, dated December 4, 2007, is reported at 943 A.2d 997 (Pa. Cmwlth. 2007) and is included in the appendix at Appendix B. The unreported decision of the Court of Common Pleas of Philadelphia County, Pennsylvania, dated July 2, 2007, is included in the appendix at Appendix C.

JURISDICTION

The decision of the Supreme Court of Pennsylvania was entered on July 2, 2008. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution, which provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The decision to authorize condemnation of property is, perhaps, the most important aspect of any eminent domain action. That decision and the process that leads to that decision must comport with fundamental requirements of eminent domain law and constitutional due process. In *U.S. v. Carmack*, 329 U.S. 230 (1946), discussed below, this Court held that condemnors may not act arbitrarily in their decisions to condemn. *Id.* at 244-245. However, this Court has not provided any further guidance as to the minimum level of investigation and consideration that is re-

quired to support a decision to condemn in order to satisfy due process considerations. Specifically, this Court has never addressed whether such due process obligations can be satisfied by investigations and consideration performed by entities other than the entity making the decision to condemn if the decision-maker never even received – let alone considered – the results of such investigations and consideration.

Under any test, the decision to condemn in this case was arbitrary. The condemnor is the Commonwealth of Pennsylvania ("Condemnor" or the "Commonwealth"). The General Assembly of Pennsylvania was the specific governmental body that made the decision to condemn.[1] This fact is expressly set forth in the "declaration of taking" filed by Condemnor and is confirmed by the testimony of its designee. Condemnor has never disputed this fact.

Incredibly, it is also undisputed that the General Assembly took *no* actions to understand and failed to consider *any* of the issues relevant to that decision. This is not an exaggeration and the record on this fact is unequivocal. Petitioner is aware that a condemnee alleging that a condemnation is arbitrary faces a heavy burden. However, the issue in this case is not whether the due diligence performed and the consideration given to the relevant issues were sufficient to support a reasoned decision to condemn. Rather, the issue in this case is the General Assembly's failure to make *any* investigation whatsoever, to review *any* results of investigations performed by others, and to consider *any* of the relevant issues.

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[1] The General Assembly of Pennsylvania is Pennsylvania's legislative body.

In *Carmack*, this Court held that a decision to condemn that is (i) "without adequate determining principle," (ii) "without consideration or adjustment with reference to principles, circumstances, or significance" or (iii) "unreasoned," is an arbitrary exercise of the power of eminent domain and, therefore, violates the condemnee's due process rights. *Id.* Since the General Assembly did not conduct any due diligence or rely on any due diligence performed by others and did not consider any of the relevant issues, its decision to condemn the Petitioner's property was necessarily an arbitrary decision.

The Commonwealth condemned Petitioner's property (the "Property")[2] as part of a project to expand the Pennsylvania Convention Center (the "Project").[3] Since the General Assembly of Pennsylvania was the governmental body that made the decision to condemn, due process demands that the General Assembly's decision to condemn not be arbitrary. However, Condemnor admits that the General Assembly did not perform any due diligence or consider any of the relevant issues before it decided to condemn the Property.

It is undisputed that:

- The General Assembly did not investigate whether there was a need to expand the Convention Center.

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[2] The Property is located at 117-121 N. Broad Street, Philadelphia, Pennsylvania.

[3] The Pennsylvania Convention Center is located in downtown Philadelphia.

- The General Assembly did not investigate the extent to which the Convention Center should be expanded.
- The General Assembly did not participate in – or even consider at all – important judgments that were made regarding the design goals of the Project.
- The General Assembly did not investigate or participate in any part of the decision-making process regarding which properties should be acquired for the Project.
- The General Assembly did not participate in important judgments regarding alternate plans for expansion, including the direction in which the expansion should occur.
- The General Assembly did not receive or review any documents whatsoever that described the expansion area "footprint."
- The General Assembly was never presented with a list of properties that were to be condemned.
- The General Assembly did not consider the historical or architectural significance of properties that were to be condemned.

In the face of the glaring constitutional violations resulting from the General Assembly's arbitrary decision to condemn the property, and in an effort to legitimize Condemnor's actions, Condemnor and the state courts of Pennsylvania have cited investigations conducted by other entities such as the Pennsylvania Convention Center Authority ("PCCA"), which is a statutorily created authority. Their claim is that investigations conducted by the PCCA and others

were sufficient to cause the General Assembly's decision to authorize the condemnation not to be arbitrary. This argument is logically and constitutionally flawed.

The *decision to condemn* must not be arbitrary. Therefore, it is the *decision-maker* – i.e., the body that authorized the condemnation – that must have the benefit of sufficient due diligence in order to obtain an appropriate understanding of the nature and scope of the proposed condemnation such that its decision is not arbitrary. As a result of the investigations that were performed, it is possible that the PCCA was in a position to make a decision to condemn that was not arbitrary. However, this is irrelevant since the decision-maker in this case was the General Assembly and not the PCCA.

Moreover, the results of the PCCA's investigations and its conclusions were never communicated to the General Assembly, and neither Condemnor nor the state courts have cited any evidence to the contrary. Accordingly, it is impossible for the General Assembly to have relied on them to satisfy its constitutional obligations before it made the decision to condemn.

It also must be noted that the condemnation process in this case was very unusual. Typically, the same governmental body that decides to condemn property will also conduct the requisite due diligence or will review and consider the investigation and conclusions of another entity relevant to that decision. For example, a state department of transportation will both (i) decide whether to condemn property for a road project and (ii) perform its own due diligence regarding that decision. Similarly, a school district will both (i) decide

whether to condemn property for a new school and (ii) either perform its own due diligence regarding that decision or review and consider the investigation and conclusions of other entities such as its staff or outside consultants.

In this case, however, the decision-maker – the General Assembly – was not the governmental body that performed the due diligence and never reviewed any of the investigations or conclusions of any other entities. This disconnect violated the Constitutional prohibition that condemnors may not act arbitrarily in their decisions to condemn.

A. Factual Background

1. The General Assembly's Decision To Condemn The Property Was Made Without Any Investigation Or Consideration Of The Relevant Issues Necessary To Reach A Reasoned Decision And Was Therefore Arbitrary

a. The General Assembly Made The Decision To Authorize The Condemnation Of The Property

It is undisputed that the General Assembly made the decision to condemn the Property. Pennsylvania law requires that the action authorizing a taking be identified in the declaration of taking, the document that effectuates the taking. In the declaration of taking it filed to condemn the Property, Condemnor expressly identified an appropriations bill known as "Act 40" as the action authorizing the condemnation and the General Assembly as the decision-maker. Thereafter, Condemnor has consistently asserted that the General Assembly authorized the Project,

including this condemnation, by passing "Act 40." Deposition of Joseph J. Resta, RR 241a.[4]

Act 40, also known as the Capital Budget Project Itemization Act of 2003-2004, is not a bill dedicated solely to the Project. On the contrary, Act 40 is an omnibus appropriations bill that approved expenditures of over $13 billion for the fiscal year 2003-2004, including almost $4 billion for "public improvements."

Incredibly, the Project was inserted into Act 40 as a mere line item. In the entire 304 pages of Act 40, the only reference to the Project is the following:

> Pennsylvania Convention Center expansion, including planning, land acquisition and construction $400,000,000

Act 40 at 44.

b. Condemnor Admitted That The General Assembly Failed To Conduct Any Investigation Or To Make A Reasoned Decision To Condemn The Property

Pursuant to a notice of deposition, Condemnor produced Joseph J. Resta as its designee to testify regarding Condemnor's decision-making process prior to the instant condemnation, including, *inter alia*, "all steps taken by the Commonwealth leading to the Commonwealth's decision to condemn the Property"; "[a]ll steps taken by the Commonwealth leading to any determination that the Property was necessary

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[4] The trial court entered a scheduling order providing, *inter alia*, that all testimony be submitted by trial depositions and directing the parties to submit briefs in support of, or in opposition to, the Preliminary Objections.

for the [Project]"; "[a]ll steps taken by the Commonwealth to determine the degree to which the Pennsylvania Convention Center should be expanded" and any consideration by the Commonwealth of the historical and architectural significance of the Property. RR 225a-238a. Mr. Resta, Deputy Secretary for Public Works for the Commonwealth of Pennsylvania Department of General Services ("DGS")[5], confirmed the complete lack of due diligence on the part of the General Assembly.

First, Mr. Resta admitted that the General Assembly did not perform any investigation whatsoever prior to approving the Project:

> Q. Mr. Resta, what investigation was conducted by the General Assembly that led them to decide to approve the project?
>
> * * *
>
> A. I don't know that they specifically conducted any investigation of their own.

Resta deposition at 21-22, RR 242a-243a (emphasis added).[6]

Mr. Resta further admitted:

- The General Assembly did not investigate whether there was a need to expand the Convention Center. Resta deposition at 47, RR 248a; see also Resta deposition at 23-24, RR 243a-244a.

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[5] Resta deposition at 17, RR 241a.

[6] Although Mr. Resta testified that he believed the PCCA performed an investigation (Resta deposition at 22), as will be addressed below, the results of that alleged investigation were never communicated to the General Assembly.

- There was no investigation by the General Assembly regarding which properties to acquire. Resta deposition at 25, RR 243a (emphasis added).
- There also was no investigation by the General Assembly regarding whether the Property should be condemned. Resta deposition at 25-26.
- The General Assembly did not review any documents that led to its determination to condemn the Property. Resta deposition at 25-26, RR 243a-244a.

Incredibly, Mr. Resta testified:

> Q. My question is: How do you know what the General Assembly approved to be acquired?
>
> A. It's not my belief that the General Assembly was presented with a listing of properties that were to be included in a future taking.

Resta deposition at 36, RR 246a (emphasis added).

As shown below, Mr. Resta's candid admissions that the General Assembly did not perform any investigation or consider any of the issues necessary to make a reasoned decision are also confirmed by the legislative history of Act 40, the written discovery conducted in this case and the testimony of other witnesses designated by Condemnor.

c. Act 40's Legislative History Proves That The General Assembly Failed To Conduct Any Investigation Or To Consider Any Of The Issues Necessary To Make A Reasoned Decision To Condemn The Property

The General Assembly consists of the Senate and the House of Representatives. The Senate did not discuss Act 40 at all. The entire discussion of the Project in the House of Representatives is confined to less than three pages of the House Journal dealing with a proposed amendment to establish an oversight committee.[7] Neither house of the General Assembly discussed the merits of the Project, and there was no presentation made to a plenary session of either the House or Senate or to any House or Senate committee that could possibly constitute an investigation or consideration of any sort – and certainly none that would satisfy due process.

It is telling that no presentations regarding the Project were made even to the House Appropriations Committee, which is the committee that originated Act 40, or to its counterpart in the Senate. In fact, of the thousands of pages of testimony of the hearing before the House and Senate Appropriations Committees, there were no references made to the Project at all – let alone discussions of important issues that the General Assembly was constitution-

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[7] The discussion of the Project related to a proposed amendment to establish an oversight committee to monitor the spending of the funds for the Convention Center. The proposed amendment had nothing to do with the size or scope of the Project, its location, or anything else that a condemnor must consider in order to make a reasoned decision to exercise the power of eminent domain, and it was ultimately withdrawn.

ally obligated to investigate and consider in order to make a reasoned decision to condemn the Property.

Therefore, the legislative history of Act 40 confirms that the General Assembly failed to conduct any investigation of its own, to review the results of any investigations performed by others, or to give any consideration to relevant issues necessary to make a reasoned decision to authorize condemnation of the Property. As a result of its inclusion in an omnibus appropriations bill, the entire Project escaped any meaningful scrutiny on the part of the General Assembly in violation of Petitioner's due process rights.

d. Condemnor Admitted In Its Responses To Discovery Requests That The General Assembly Failed To Conduct Any Investigation Or To Give Any Consideration To Issues Necessary To Make A Reasoned Decision To Condemn The Property

Condemnor's responses to Petitioner's discovery requests also confirm that the General Assembly failed to perform the necessary investigation or to give due consideration to relevant issues. For example, Condemnor was directed to identify everything that was done to determine which properties should be condemned for the Project and to identify all persons involved with that decision. Interrogatories And First Request For Production Of Documents Of Condemnee Addressed To Condemnor, at Interrogatory No. 14. Condemnor responded:

> The decision as to the direction of the expansion of the Convention Center, the area of expansion and the reasons supporting that decision are

> contained in documents identified in the Commonwealth's Response to Condemnee's Request for Production of Documents.
>
> **The persons involved in the decision to accept those recommendations included the PCCA, its Board of Directors, its staff and its consultants. These decisions became the Convention Center Expansion Project, for which the General Assembly appropriated capital funding.**

See Restated and Supplemental Answer of Condemnor to Interrogatories and First Request for Production of Documents of Condemnee at Response to Interrogatory 14, RR 264a-266a (emphasis added).

Therefore, by Condemnor's own admission, it was the "PCCA, its Board of Directors, its staff and its consultants" – and not the General Assembly – that allegedly investigated, and ultimately decided, which properties to condemn. Condemnor does not – and cannot – identify any meetings or communications between the PCCA (including its Board of Directors, its staff and/or its consultants) and the General Assembly that would have enabled the General Assembly to satisfy its constitutional obligations to first conduct a proper investigation and then to consider relevant issues necessary to make a reasoned decision as to which properties should be condemned. In fact, as shown above, the details of the Project, including its proposed footprint, were never even communicated to the General Assembly, much less considered.

Condemnor's responses to discovery requests confirm that the General Assembly failed to conduct any investigation or to consider any of the relevant issues

that would have enabled it to make a reasoned decision to condemn the Property.

e. The Only Investigations Regarding The Project Were Purportedly Conducted By The PCCA And Its Consultants, The Results Of Which Were Never Communicated To The General Assembly

It is clear that the PCCA was the driving force behind the Project. It is also clear that the PCCA – and not the General Assembly – conducted the only investigations regarding the Project and never communicated the results of its investigations to the General Assembly. The PCCA made all of the decisions regarding fundamental issues such as whether there was a need for expansion, the extent to which the existing Convention Center needed to be expanded, and the expansion plan, including the direction in which the expansion should occur and which properties should be condemned. The PCCA never communicated the results of any investigations to the General Assembly and the General Assembly never considered any of the fundamental Project issues. Rather, as Condemnor admitted in its response to discovery requests, it was the "*PCCA, its Board of Directors, its staff and its consultants*" – and not the General Assembly – that investigated and ultimately decided which properties would be taken.

Mr. Resta testified that the investigation which led to the approval of the Project was conducted by the PCCA:

> Q. Okay. Mr. Resta, what investigation was conducted by the General Assembly that led them to decide to approve the project?

A. Investigation?

Q. Yes.

A. I don't know that they specifically conducted any investigation of their own.

Q. Okay. In other words, the investigation was done by the PCCA?

A. To my knowledge, yes.

Resta deposition at 21-22, 242a-243a (emphasis added).

The PCCA – not the General Assembly – decided that there was a need to expand the existing Convention Center and the extent to which expansion was necessary. Butera deposition at 12-13, RR 282a. There is no evidence that the PCCA communicated its decision that there was a need to expand – or any of the factors that led to such decision – to the General Assembly.

The PCCA – not the General Assembly – retained professionals including an architectural team to investigate potential expansion sites. None of those professionals, including the architectural team, ever made any presentations to the General Assembly and the results of the investigations by the professionals retained by the PCCA were never communicated to the General Assembly.

The facts are undisputed that the PCCA – not the General Assembly – selected the area for expansion of the Convention Center and the specific properties to be condemned and communicated that information to the Department of General Services, the department charged with the responsibility to effectuate the condemnation on behalf of Condemnor. Mr. Resta testified:

Q. Okay. So, the Pennsylvania Convention Center Authority went directly to DGS and said, in essence, here is the footprint for the project?

A. Yes.

Q. The General Assembly never said to DGS, this is the footprint of the properties to be acquired; correct?

A. Correct.

Resta deposition at 37, RR 246a.

In fact, as Mr. Resta admitted, the General Assembly never told DGS to condemn the Property:

Q. Now, in between the passage of Act 40 and August 21, 2006, are you aware of any communications from the General Assembly to DGS in which the General Assembly told DGS to condemn the Ate Kays property?

A. No.

Q. Are you aware of any communications in which the General Assembly told DGS to acquire the Ate Kays property?

A. No.

Resta deposition at 43, RR 247a.

Another important issue investigated by the PCCA – and not the General Assembly – was the historical nature of the potential expansion area and the properties within it. The PCCA concluded that the Project would have an adverse impact upon historic properties. However, that conclusion was never communicated to the General Assembly. Resta deposition at 51, RR 249a. In fact, the General

Assembly never considered the historical significance of the Property. *Id.* In the end, as will be discussed below, it was the PCCA – not the General Assembly – that decided which of the properties that were originally within the "footprint" of the Project would be taken and which would be preserved, and it decided that only one building – the Liberty Title Building located at 101 N. Broad Street – should not be condemned because of its historical significance. Perks deposition at 56-58, RR 277a-278a. This decision was made after the General Assembly authorized the acquisition of properties for the Project and was never communicated to the General Assembly.

Because the PCCA – not the General Assembly – knew of the historical significance of the properties within the expansion area, it was the PCCA – not the General Assembly – which held meetings and negotiations with the Pennsylvania Historical and Museum Commission (the "Historical Commission"). Perks deposition at 15, RR 274a. As Mr. Perks described, "there was a lot of give and take" between the PCCA and the Historical Commission. Perks deposition at 56, RR 277a. Ultimately, it was the PCCA – not the General Assembly – that entered into a "Memorandum of Agreement" with the Historical Commission, a copy of which is included in the Reproduced Record at 294a-304a. The Memorandum of Agreement was "negotiated over a couple of years." Perks deposition at 56, RR 277a. The General Assembly did not participate. Butera at 32, RR 287a.

The Memorandum of Agreement expressly states that "it has been determined that the proposed construction of the Project will have an 'adverse effect' upon historic properties included in and eligible for

inclusion in the National Register of Historic Places." However, the General Assembly was never told that the Project would have "an adverse effect upon historic properties." Resta deposition at 54, RR 250a.

The Memorandum of Agreement at p.1, RR 295a (emphasis added) also provides:

> Whereas the Pennsylvania Convention Center Authority has met in open and public sessions with representatives of the entire Philadelphia Area community, including the Philadelphia Historical Commission, the Pennsylvania Historic and Museum Commission, and several neighborhood groups, and then separately with the Philadelphia Historical Commission staff and the Preservation Alliance staff to present the Pennsylvania Convention Center Authority's proposal for the expansion of the Pennsylvania Convention Center to Broad Street, and **whereas we discussed the loss of certain historical structures, retention of others, and the proposed rehabilitation of portions of others**.

Accordingly, it was the PCCA – not the General Assembly – which considered the historical nature of the properties and met with the various historic groups to make decisions regarding which "historic structures" would be "lost," which "historic structures" would be "retained" and which "historic structures" would be "rehabilitated."

Under the plans for the Project as determined by the PCCA, one "historic structure" that is fated to be "lost" – not "retained" or "rehabilitated" – is the building located on the Property (the "Building"). Notwithstanding the fact that the PCCA was well

aware of the historical significance of the Building and knew that this was an important issue, it never communicated these facts to the General Assembly. For example, the General Assembly was never told that the Building's "significance has been acknowledged with national historic designation." Resta deposition at 62-63, RR 251a. In fact, the General Assembly was never provided with any information regarding the historical significance of the Building. Resta Deposition at 51, RR 249. Therefore, the General Assembly did not consider how any of these critical issues might affect the decision to condemn the Property and, as a result, it could not have made a reasoned decision to condemn the Property. As a result, Petitioner was deprived of its due process right to a reasoned decision by the General Assembly, the body that made the decision to condemn its Property.

f. The Properties To Be Condemned For The Project Were Subject To Change – And In Fact Were Changed – Without The Approval Of The General Assembly, Even After The Passage Of Act 40

The arbitrary and capricious nature of Condemnor's actions is further evidenced by the treatment of the other properties located within the same block as the Property. In addition to the Property, there are two other properties located within the same block with frontage on Broad Street. Since the passage of Act 40, decisions have been made regarding the fates of those two properties – which were within the footprint for the Project that existed at the time the General Assembly authorized the condemnation of the Property and other properties for the Project – without ever consulting the General Assembly.

For example, during most of the period when the PCCA investigated and planned the Project, the building located at 101 N. Broad Street, which is known as the Liberty Title Building, was among the properties that were planned to be taken. The Liberty Title Building remained within the footprint of the Project as contemplated by the PCCA at the time Act 40 was adopted by the General Assembly. Resta deposition at 64.

However, after the passage of Act 40, as discussed above, the PCCA and the Historical Commission – not the General Assembly – agreed that the Liberty Title Building would not be taken. This agreement was set forth in the Memorandum of Agreement executed after Act 40 was passed. Mr. Perks testified:

Q. Are you familiar with the Liberty Title Building?

A. Yes.

Q. Is that included in the current footprint [of the Project]?

* * *

A. No, it's not.

Q. Were you involved in helping to assess whether it should or should not be?

A. Yes.

Q. Can you tell us what you did and what conclusion you came to?

A. Well, as I told you, [the Memorandum of Agreement] got negotiated after a couple of years. There was a lot of give and take. And some of the community . . . lobbied hard to

> save that building . . . . So we agreed that we would not take that.

Perks deposition at 56-57, RR 277a-278a.

However, the General Assembly never approved this change of the Project footprint. Resta deposition at 64-65, RR 251a. Mr. Resta testified:

> Q. Now, the Liberty Title Building was within the footprint at the time that the Act 40 was approved; correct?
>
> A. Yes.
>
> Q. Did anyone go back to the General Assembly and ask them if it was okay not to acquire the Liberty Title Building?
>
> A. Not to my knowledge.
>
> Q. So, the project changed, at least with respect to the Liberty Title Building, when the decision was made not to acquire the Liberty Title Building; correct?
>
> A. Correct.
>
> Q. And did anyone ask the General Assembly if it was okay to change the project?
>
> A. No.

Id.

Therefore, even after the passage of Act 40, entities other than the General Assembly negotiated, were lobbied and ultimately decided which properties would be taken and which properties would be spared. Amazingly, no one ever went back to the General Assembly to inform it that the Project had been changed.

Thus, the properties to be condemned for the Project remained subject to change – and in fact were changed – without the approval of the General Assembly, even after Act 40 was passed. Subsequent decisions regarding which properties would be condemned and which would be spared were made by others – based on information that was not available to the General Assembly. Such decisions were never approved by the General Assembly. These actions further evidence that the General Assembly's decision to condemn the Property was arbitrary.

B. Proceedings Below

On October 25, 2006, Petitioner challenged the condemnation by filing its Preliminary Objections, which is the procedural mechanism in Pennsylvania for challenging condemnations. The Preliminary Objections contend that the decision to authorize the condemnation of the Property was arbitrary and capricious and an abuse of discretion. By Order dated July 2, 2007, the trial court overruled the Preliminary Objections. *See* Appendix C.

On July 19, 2007, Condemnor filed a Petition for Writ of Possession in the Court of Common Pleas of Philadelphia County, Pennsylvania which was granted on September 17, 2007. *See* Appendix D. On September 28, 2007, Petitioner filed with the Commonwealth Court of Pennsylvania an application to stay the Writ of Possession which application was denied on October 10, 2007. *See* Appendix E.

On October 23, 2007, Petitioner filed an application with the Supreme Court of Pennsylvania asking that court to stay the Writ of Possession until Petitioner had an opportunity to have appellate review of the July 2, 2007 Order overruling Petitioner's Preliminary

Objections to the Declaration of Taking. That application was denied by Order dated November 9, 2007. *See* Appendix F.

Petitioner also timely appealed the trial court's Orders overruling the Preliminary Objections and granting the Writ of Possession. The Commonwealth Court affirmed both Orders of the trial court by Order dated December 4, 2007. *See* Appendix B. On December 18, 2007, Petitioner filed an Application for *En Banc* Reargument of the December 4, 2007 Opinion, based on the reviewing Panel's substantial misapprehension of the record and unsupported assumptions relating to facts not of record, which application was denied on February 1, 2008.

Petitioner timely appealed to the Supreme Court of Pennsylvania the Commonwealth Court's December 4, 2007 Order affirming the Trial Court's overruling of the Preliminary Objections and granting of the Writ of Possession. Petitioner also filed an emergency application for stay with that Court. By Order dated July 2, 2008, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal and Emergency Application for Stay. *See* Appendix A.

REASONS FOR GRANTING THE PETITION

Few issues have received as much attention by the courts and by the public as those relating to the government's use of its eminent domain power. Indeed, recognizing the importance of these issues, this Court has decided at least four eminent domain cases since 2005.

However, the specific issue of this case has not been addressed by this Court since 1946. In *U.S. v. Carmack*, 329 U.S. 230 (1946), discussed below, this

Court noted that condemnors may not act arbitrarily in their decisions to condemn. However, the Court concluded that it was "unnecessary" to consider the issue in that case. This Court has not provided any further guidance as to the minimum level of investigation and consideration that a condemnor must conduct to satisfy due process considerations.

Court have traditionally given great deference to the judgment of condemnors. However, along with that deference is the responsibility to respect the due process rights of property owners. As Justice Kennedy warned in his concurring opinion in *Kelo v. City of New London, Conn.*, 545 U.S. 469, 488 (2005), courts must be wary of eminent domain cases "in which the transfers are so suspicious, or the procedures employed so prone to abuse . . . ." *Id.* at 493.

Given the extent to which the power of eminent domain is utilized and the deference paid to the judgment of condemning authorities, it is imperative that this Court confirm that the body that decides to condemn property must conduct, at least, some due diligence – or else actually consider and rely on due diligence performed by others – before it makes its decision. Otherwise, the decision to condemn is necessarily arbitrary and the condemnation – and the condemnor – violates the property owner's due process rights.

As this Court has held, the Fifth Amendment "stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 164. Indeed, "[T]he touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

Some condemnors may have been emboldened by this Court's decision in *Kelo* and it is critical that there is a balanced approach. In this case the due process was flagrantly violated. The court has the opportunity in this case to make clear that condemnor must give the condemnee due process. It is imperative that this Court provide guidance for the "protection of the individual against arbitrary action of government."

Accordingly, Petitioner respectfully submits that the Petition should be granted.

I. THE DECISION BELOW EVIDENCES THE NEED FOR GUIDANCE AS TO A CONDEMNOR'S DUE PROCESS OBLIGATIONS REGARDING THE DECISION TO CONDEMN

A. A Decision To Condemn Which Is Arbitrary Is Unconstitutional

The Fifth Amendment to the Constitution of the United States provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment's prohibition against the taking of private property for public use without just compensation applies against the States through the Fourteenth Amendment which also prohibits states from depriving any person of life, liberty, or property, without due process of law. *Texaco, Inc. v. Short*, 454 U.S. 516, 523 n.11, (1982); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1908).

This Court has held that the Fifth Amendment "stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 164. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court opined:

> Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action:
>
> The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 17 U.S. 235, 4 Wheat. 235-244, 4 L.Ed. 559 [(1819)]: 'As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'
>
> We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government.

Id. at 844 (emphasis added; citations omitted).

As one commentator has explained, "[t]he legislative power of the state can only be exerted in subordination to the fundamental principles of right and justice, which the guaranty of due process of law was intended to preserve. A purely arbitrary or capricious exercise of that power, resulting in a wrongful invasion of private property rights, is

violative of the due process guaranty." 1A-4 Nichols on Eminent Domain § 4.9. In addition, "the clause of the constitution which prohibits the taking of life, liberty or property without due process of law was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." 1A-4 Nichols on Eminent Domain § 4.4 (*citing Bank of Columbia v. Okely*, 17 U.S. 235 (1819); *Ownbey v. Morgan*, 256 U.S. 94, (1921); *Curry v. McCanless*, 307 U.S. 357 (1939)).

In *U.S. v. Carmack*, 329 U.S. 230 (1946), the condemnee alleged that the condemnor acted "arbitrarily." *Id.* at 244. This Court ultimately concluded that it was "unnecessary" in that case to consider the issue. *Id.* at 244-245. However, this Court clearly found that a decision to condemn is arbitrary if it is made "without adequate determining principle." *Id.* at 244.

This Court defined "arbitrary" by stating:

> "Arbitrary" is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944), as "1 * * *; without adequate determining principle; * * *" and by Webster's New International Dictionary, 2d Ed. (1945), as "2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, * * * decisive but unreasoned; * * *."

Id. at 243, n.14.

Therefore, a decision to condemn that is "without adequate determining principle," "without consideration or adjustment with reference to principles, circumstances, or significance," or is "unreasoned," is an arbitrary exercise of the power of eminent domain

and, therefore, violates the condemnee's due process rights. *See* 1A-4 Nichols on Eminent Domain § 4.12 ("in order that the exercise of the legislative power [of eminent domain] shall not conflict with the constitutional provisions for due process of law it is essential that the legislative enactment . . . [b]e not arbitrary").

Further, "due process limits the power to condemn private property to such and only so much property as is necessary for the public use in question." CJS Constitutional Law § 1854. "Condemning more property than needed for a public use is held to be a denial of due process." Am. Jur. Eminent Domain § 39.

Commentators have used similar definitions of "arbitrary" in the eminent domain context. For example, as one commentator has explained:

> Broad discretion is vested in those to whom the power of eminent domain is delegated. However, a condemnor's discretion is not unfettered, as it must act in good faith and within the powers conferred upon it by law. Further, it has been said that the power of eminent domain is to be exercised with restraint, not abandon.

26 Am. Jur. 2d Eminent Domain § 31.

In fact, it is the responsibility of the judiciary to ensure that the awesome power of eminent domain is used properly and within the requirements of the law:

> The exercise of the power of eminent domain is not entirely beyond judicial scrutiny, and it is incumbent upon the judiciary to ensure that the power is used in a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in

> question. The power and the obligation of eminent domain plays a critical role in constitutional governance, and courts are obligated to carefully monitor its exercise. The means or mechanics of executing a project are not beyond judicial scrutiny once the public purpose has been established; rather, the constitutional restrictions on eminent domain control.

26 Am. Jur. 2d Eminent Domain § 32.

It has also often been said that a condemnee alleging that a condemnation is arbitrary and capricious and an abuse of discretion faces a heavy burden. However, the issue in this case is not whether the investigation conducted by the General Assembly or its consideration of the issues relevant to the condemnation was proper or whether the General Assembly had enough information to reach a "reasoned" decision on behalf of the Commonwealth. In this case, the General Assembly conducted *no investigation* and received *no information* upon which it could make a "reasoned" decision and, therefore, the decision to condemn was "without consideration or adjustment with reference to principles, circumstances, or significance."

Petitioner is not asking this or any other court to "second-guess [Condemnor's] considered judgment" and is not asking for a "heightened form of review." *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 488-489 (2005). Rather, in this case, Condemnor did not make any "judgment" and Petitioner is only asking for a review mandated by due process. As Justice Kennedy warned in his concurring opinion in *Kelo*, there are eminent domain cases "in which the transfers are so suspicious, or the procedures

employed so prone to abuse" which mandate judicial review. *Id.* at 493. The "procedures employed" in this case did result in "abuse" of the eminent domain power.

It is undisputed that:

- The General Assembly did not investigate whether there was a need to expand the Convention Center.
- The General Assembly did not investigate the extent to which the Convention Center should be expanded.
- The General Assembly did not participate in – or even consider at all – important judgments that were made regarding the design goals of the Project.
- The General Assembly did not investigate or participate in any part of the decision-making process regarding which properties should be acquired for the Project.
- The General Assembly did not participate in important judgments regarding alternate plans for expansion, including the direction in which the expansion should occur.
- The General Assembly did not receive or review any documents whatsoever that described the expansion area "footprint."
- The General Assembly was never presented with a list of properties that were to be condemned.
- The General Assembly did not consider the historical or architectural significance of properties that were to be condemned.

It should also be noted that there were a number of ways in which the Condemnor could have satisfied its due process obligations before it condemned Petitioner's Property. For example, it was always intended that the condemning agency for the Project would be the PCCA or the Redevelopment Authority for the City of Philadelphia (the "RDA"), both of which possess the power of eminent domain. For example, on January 28, 2001, the RDA sent a letter to Harry Perks in his capacity as a representative of the PCCA. January 28, 2001 letter from Harry Perks to Herbert Wetzel, RR at 368a-373a. This letter addressed a number of different issues with respect to the Project, including property acquisition. *Id.* It stated that "counsel for PCCA and RDA will evaluate and determine whether the eminent domain powers of PCCA or RDA will be used for acquisition." *Id.*, RR 368a-369a; *see also* Dema deposition at 11, RR 375a-378a. Therefore, the plan was for the PCCA or the RDA to be the condemning agency for the Project. *Id.*

However, for political reasons, the General Assembly decided against doing it "the right way" and rejected having the PCCA or the RDA serve as the condemning agency. When issues developed concerning the funding of the Project and the General Assembly decided to fund the Project, it also decided that the Commonwealth acting through the Department of General Services should be the condemning authority. The General Assembly apparently concluded that if it was going to provide funding for the Project, it wanted to have control over the spending of the funds. However, the General Assembly failed to satisfy its Constitutional obligations before it took Petitioner's Property.

In addition, the General Assembly certainly could have – and should have – performed the necessary due diligence before it decide to condemn Petitioner's Property. For example, it could have – and should have – held hearings before the appropriate committees and otherwise reviewed the information necessary to make the decision to condemn. However, the General Assembly chose not to do it "the right way."

The General Assembly's appalling failure to satisfy its due process obligations is not a case of "no harm, no foul." The General Assembly's complete disregard of the rights of property owners are not mere technical violations of meaningless statutes. Rather, these obligations are based upon constitutional principles that go to the heart of our society and our laws; they are critical requirements that must be satisfied before any condemnor may take property.

Accordingly, the decision to condemn was arbitrary and violated Petitioner's due process rights.

B. Investigations Conducted By The PCCA Cannot Be Imputed To The Decision-Maker – the General Assembly – And Therefore Cannot Satisfy The Due Process Prohibition Against Arbitrary Decisions To Condemn Property

It is undisputed that the specific governmental body that made the decision to condemn in this case was the General Assembly. It is also undisputed that the General Assembly did not perform any due diligence of its own in connection with its decision to condemn. Left with no other choice, Condemnor and the state courts rely upon the investigation conducted by the PCCA to satisfy Condemnor's due process

obligations. They argue that the due diligence conducted by the PCCA was sufficient to cause the General Assembly's decision to authorize the condemnation not to be arbitrary. This argument is logically and constitutionally flawed.

It is the *decision to condemn* that must not be arbitrary. Therefore, it is the *decision-maker* – i.e., the body that authorized the condemnation – that must have an appropriate understanding of the nature and scope of the proposed condemnation such that its decision is not arbitrary. Whether the PCCA's due diligence was sufficient is irrelevant since (i) the decision-maker was the General Assembly and not the PCCA and (ii) the results of the PCCA's due diligence were never communicated to the General Assembly. These facts are undisputed. Certainly, the General Assembly's decision to condemn cannot be justified based on information it never received nor relied on.

In this case, the General Assembly – not the PCCA – made the "decision to condemn." Accordingly, the only due diligence, if any, that would be relevant is the due diligence that was actually considered by the General Assembly. It is undisputed that the General Assembly did not conduct any investigation of its own. Since the results of the PCCA's investigation were never communicated to the General Assembly, the General Assembly could not have relied on those results in making its decision to condemn. Without having the benefit of any due diligence, the General Assembly could not possibly have made a reasoned decision when it authorized the condemnation of the Property.

Condemnor seeks to confuse the relevant issue by arguing that it is permitted to act through its agents

and that this case is merely an implementation of that principle. Condemnor argues that (i) the PCCA is a Commonwealth agency, (ii) the PCCA and the General Assembly are part of one integrated unit, and (iii) the PCCA's investigation and judgment can be imputed to the General Assembly.

Petitioner agrees that it may not be practical to require the General Assembly to conduct all of the necessary due diligence itself. That is not Petitioner's position. Petitioner does not dispute the fact that the General Assembly *could have* relied on its agents to perform the necessary due diligence in this case. However, the *General Assembly* was required to review and consider such due diligence before the *General Assembly* decide to condemn the Property. The General Assembly did not perform its own due diligence or rely on due diligence performed by its agents. As a result, it did not rely on any due diligence in making its decision to condemn.

Notwithstanding the relationship between the Commonwealth and the PCCA, due process prohibits the decision-maker (in this case, the General Assembly) from making a decision to condemn that is "without adequate determining principle," is "without consideration or adjustment with reference to principles, circumstances, or significance," or is "unreasoned." Such a decision is an arbitrary exercise of the power of eminent domain and, therefore, violates the condemnee's due process rights.

The Commonwealth Court appears to lend credence to this view by asserting that the law does not require the General Assembly itself to conduct "every step" of the process and that to require otherwise would cause the state government to "grind

to a halt." *See* Appendix B. However, this argument is a "red herring."

The condemnation process in this case was very unusual. Typically, the same governmental body that decides to condemn property will also conduct the requisite due diligence or will review and consider the investigation and conclusions of another entity relevant to that decision. For example, a state department of transportation will both (i) decide whether to condemn property for a road project and (ii) perform its own due diligence regarding that decision. Similarly, a school district will both (i) decide whether to condemn property for a new school and (ii) either perform its own due diligence regarding that decision or review and consider the investigation and conclusions of other entities such as its staff or outside consultants.

In this case, as shown above, one entity – the General Assembly – decided to condemn and another entity – the PCCA – conducted the due diligence. The relief requested by Petitioner will not impact condemnations conducted properly where the same entity decides to condemn and conducts the due diligence.

Petitioner respectfully requests that this Court confirm that a condemnor must conduct, at a minimum, *some* due diligence – or else actually consider and rely on due diligence performed by others – before it makes its decision to condemn. Otherwise, the decision to condemn is necessarily arbitrary and the condemnation – and the condemnor – violates the property owner's due process rights.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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